PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the California Supreme Court (App. 1a-71a), as modified on petition for rehearing, is published at 33 Cal. 4th 943, 95 P.3d 422, 17 Cal. Rptr. 3d 180 (2004). The order of the California Supreme Court denying petitioners' petition for rehearing and modifying that Court's original opinion (App. 165a-169a) is unpublished. The California Supreme Court's decision reversed a decision of the California Court of Appeal (App. 129a-164a) published at 128 Cal. Rptr. 2d 320 (2002). The California Court of Appeal's decision on remand (App. 72a-128a) is published at 129 Cal. App. 4th 988, 29 Cal. Rptr. 3d 462 (2005). The Court of Appeal's order denying petitioners' request for rehearing (App. 170a-171a) was certified for publication. The California Supreme Court's order denying a Petition for Review (App. 172a) is unpublished.

JURISDICTION

The California Supreme Court, on August 24, 2005, denied review of the Court of Appeal's decision on remand (App. 172a), which resolved all remaining federal issues. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at pp. 173a-186a.

STATEMENT OF THE CASE

A. The Federal Regulatory Framework.

Congress enacted the Federal Alcohol Administration Act of 1935 ("FAAA") "to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages." 27 U.S.C. §203. The FAAA and the regulations thereunder comprise a set of "national rules governing the distribution,

production, and importation of alcohol." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995).

The FAAA gives regulatory authority over the labeling of alcoholic beverages to the Secretary of Treasury and his delegate, the Alcohol and Tobacco Tax and Trade Bureau ("TTB").[1] The statute requires TTB to promulgate labeling regulations that will "prohibit deception of the consumer" and "provide the consumer with adequate information as to the identity and quality of the products." 27 U.S.C. §205(e)(1)-(2). Wine labeling regulations are set forth in 27 C.F.R. Parts 4, 9, and 12, and regulations specifically pertaining to deceptive wine labeling include 27 C.F.R. §§4.30(a), 4.33(b), 4.38a(a), and 4.39(a)(1).

The FAAA also requires the government to review all alcoholic beverage labels used in interstate and foreign commerce to ensure compliance with all pertinent regulations, including those pertaining to deception. *See* 27 U.S.C. §205(e). Thus, labeling "specialists" at TTB review *every* new product label "on a case-by-case basis to determine whether any particular label is likely to mislead consumers, including as to the origin of the product" or otherwise fails to conform to federal regulations. 66 FED. REG. 29,476, 29,478 (May 31, 2001); *see* 27 C.F.R. §§4.30, 4.50, 13.21(a). Upon determining that a label comports with these requirements, TTB issues a certificate of label approval ("COLA") expressly authorizing use of that label.[2] No alcoholic beverage may be shipped or sold in interstate or foreign commerce unless it bears a label thus approved. 27 U.S.C. §205(e); 27 C.F.R. §4.50.

---

[1] *See* 27 U.S.C. §§205(e), 215; 27 C.F.R. Parts 4, 5, 7, 9, 12, 13, and 16. TTB is the recent successor to the Bureau of Alcohol, Tobacco and Firearms ("BATF"). *See* 68 FED. REG. 3744 (Jan. 24, 2003). The opinions below refer collectively to both agencies as the BATF.

[2] *See* 27 C.F.R. §4.50. The issuance or denial of a COLA is a final, appealable agency action, and the revocation or cancellation of a COLA is subject to due process. *See* 27 C.F.R. §§13.41-.45.

B. Federal Regulation Of Geographic Brand Names.

TTB regulations require all wine labels to bear a brand name. 27 C.F.R. §4.32(a)(1). Wine brands frequently contain geographic terms that may refer to the location of the winery or where the grapes were grown, or may be entirely fanciful. For decades, geographic wine brands were generally permitted, but unless a wine was made from grapes grown in the place referenced in the brand, TTB also required the label to bear an "appellation of origin" (one of a class of approved designations of winegrape-growing regions) or some other terminology sufficient to dispel any erroneous impression the brand might give about the wine's origin. *See* 49 FED. REG. 19,330, 19,331 (May 7, 1984) (history of regulation of geographic wine brands); *see generally* 27 C.F.R. §§4.25, 4.34(b) (appellations of origin).

In 1986, TTB issued a new regulation on geographic brands, which remains in force today. 27 C.F.R. §4.39(*i*). Under the regulation, geographic brand names adopted after the regulation's effective date (July 7, 1986) "may not be used unless the wine meets the appellation of origin requirements for the geographic area named." *Id.* Brand names used in labels approved by TTB *before* that date, however, may continue to be used under any of three conditions (*id.*):

> (i) The wine shall meet the appellation of origin requirements for the geographic area named; or (ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either: (A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or; (B) A state, county or a viticultural area, if the brand name bears a state name; or (iii) The wine shall be labeled with some other statement which the appropriate ATF officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

In the *Federal Register* notice publishing this rule, TTB noted that, over the course of the rulemaking, it had considered adopting an unqualified rule restricting all geographic brand names, including established brands, to wines from the region referenced in the brand, but had concluded that such a rule would be too restrictive. *See* 51 FED. REG. 20,480, 20,482 (June 5, 1986); 49 FED. REG. at 19,331. TTB explained that the distinction between new brands and established brands would "provide industry with sufficient flexibility in designing their labels, *while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names*." *See* 51 FED. REG. at 20,482 (emphasis added). In reaching this conclusion, the agency relied on its own experience as well as evidence in the rulemaking record that existing geographic brand names had developed a significant following among consumers, who understood that the brand names did not identify the wine's origin. *See* 51 FED. REG. at 20,481. A 2001 *Federal Register* notice reiterated TTB's view that an appellation of origin will dispel any confusion that an established geographic brand otherwise might cause.[3]

C. California's "Napa Brand" Statute.

Although Respondent Napa Valley Vintners Association ("NVVA") did not oppose 27 C.F.R. §4.39(*i*) when it was published for comment, the trade association has since lobbied TTB, without success, to eliminate or phase out the rule's grandfathering provision. *See* 51 FED. REG. at 20,480; PA 469-72.[4] In 2000, the NVVA redirected its

---

[3]*See* 66 FED. REG. 29,476. In that notice, TTB recognized a new California viticultural area called "Santa Rita Hills" despite the existence of a popular Chilean wine sold under the brand name "Santa Rita." TTB concluded that continued use of the brand would not be confused with the new viticultural area, as long as a suitable Chilean appellation of origin appeared on the label. *See* 66 FED. REG. at 29,478.

[4]"PA" refers to the Appendix to the Petition for Writ of Mandate filed by petitioners in the California Court of Appeal.

efforts at the California Legislature, which proved more pliant. *See* PA 415, 469, 477. The NVVA persuaded members of the Legislature that the grandfather clause contained in 27 C.F.R. §4.39(*i*) was a pernicious "loophole" that, given TTB's inaction, should be closed by the Legislature. App. 6a; *see, e.g.*, RA 1 (statement of Assemblywoman Wiggins); *id.* at 16 (statement of Sen. Chesbro).[5]

The resulting legislation, California Business and Professions Code Section 25241, prohibits wine "produced, bottled, labeled, offered for sale, or sold" in California from bearing "in a brand name or otherwise" the word "Napa" or the name of any federally recognized viticultural area within Napa County (such as Rutherford or Stag's Leap), unless at least 75% of the wine is made from grapes grown in Napa County. CAL. BUS. & PROF. CODE §25241(b)-(c) (incorporating 75% content requirement set forth in 27 C.F.R. §§4.25(a)(1); 4.25a(b)(1)(i)); *see* 27 C.F.R. Part 9 (listing federally recognized viticultural areas). Section 25241 does not restrict the use of non-Napa brand names, such as "Monterey Vineyards" or "Sonoma Creek," nor does it preclude the use of brand labels denoting a viticultural area *within* Napa, such as the brand "Stag's Leap Wine Cellars," for wine made with grapes grown *outside* the Stag's Leap District but within Napa County."[6] Because Section 25241 applies to wine "produced" or "bottled" in California but exported from the state for sale to consumers elsewhere, it effectively prohibits interstate and foreign shipments or sales of wines bearing proscribed brand names, regardless whether

---

[5]"RA" refers to the Appendix filed by Respondents California Department of Alcoholic Beverage Control and its Director in the California Court of Appeal.

[6]App. 8a n.8. The statute was written this way to permit influential members of the NVVA to continue using their geographic brands as they had done before. *See* RA 51.

TTB authorized the use of those brands in 27 C.F.R. §4.39(*i*) and individual COLAs. *See* App. 5a n.6.

D. Bronco's Brands And Labels.

Petitioner Bronco Wine Company ("Bronco"), a California wine producer with winery facilities in Northern California, produces a variety of moderately-priced California wine brands, which it sells throughout the country and the world. *See* PA 185, 187, 222-68; App. 2a. Petitioner Barrel Ten Quarter Circle bottles some of Bronco's brands under contract at its winery in Napa, California. *See* App. 2a. Three of those brands—"Napa Ridge," "Rutherford Vintners" and "Napa Creek Winery"—are covered by Section 25241. These brands have been in existence since well before 1986 and have long been used by Bronco and its predecessors with both Napa and non-Napa wines. App. 3a, 82a; *see also* PA 410.

Under 27 C.F.R. §4.39(*i*)(2), petitioners are authorized to use each of these "grandfathered" brands in interstate and foreign commerce for wines made from grapes grown in areas other than the places named in the brands, as long as the label also contains a conspicuous appellation of origin or some other statement "sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine." It is undisputed that the labels comply with this regulation. *See* App. 1a, 7a. Indeed, Bronco's labels contain *both* an appellation of origin on the front label *and* additional statements about the wine's origin on the back label, such as, "Our barrel select Merlot grapes ripened to perfection in carefully tended vineyards in California's celebrated Lodi viticultural area." PA 203. Moreover, TTB has issued a COLA for every one of Bronco's labels containing any of the effected brands. *See* App. 73a; RA 13-14, 855, 864-69, 870-74, 876-77, 953, 1282, 1330, 1401. These COLAs represent "case-by-case" determinations as to whether, *inter alia*, "the labels are likely to mislead consumers, including as to the origin of the

product." 66 FED. REG. at 29,478. The use of all such labels, however, is prohibited by California's Section 25241, just as the California Legislature intended.

E. The Proceedings Below.

Before Section 25241's effective date, petitioners initiated proceedings in the California Court of Appeal to challenge the law's constitutionality. App. 129a; *see* App. 8a n.9. Petitioners argued that, as to wine destined for sale in interstate and foreign commerce, Section 25241 is preempted by both 27 C.F.R. §4.39(*i*)(2)(ii) and the federal COLAs approving Bronco's labels. App. 131a-32a. Petitioners also asserted a claim under the First Amendment, among other constitutional provisions. *See id.* The NVVA intervened to join California's Department of Alcoholic Beverage Control in defending the statute. App. 9a.

The Court of Appeal held Section 25241 preempted because the statute "prohibits precisely that which the federal law permits," App. 132a, namely, the use of Bronco's grandfathered brands and approved labels in interstate and foreign commerce. The court rejected the contention that Section 25241 enjoys a "presumption against preemption" because it arose in "an area traditionally occupied by the states." App. 147a. The court reasoned that, when "Congress acts within an area delegated to it under the Constitution" and state law "directly conflicts" with that federal law or regulations pursuant thereto, no "presumption" can save the state law from invalidation. App. 147a-48a. The court did not reach petitioners' other constitutional claims. *See* App. 131a n.3.

On review, the California Supreme Court reversed. App. 1a. The California Supreme Court devoted much of its analysis to the burden of proof. App. 11a-59a. Citing decisions of this Court, the California Supreme Court held that "a strong presumption against preemption applies" in this case, because "the protection of consumers from potentially misleading brand names and labels of food and

beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states." App. 14a. The court deemed the presumption applicable despite the long history of federal regulation of this field, because (according to the court) that history did not date back to "'the beginning of our Republic.'" *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 99 (2000)).

The court also held that, to overcome the presumption against preemption, Bronco would have to show a "clear or manifest intent on the part of Congress, or congressional intent as interpreted by the TTB, to preempt the traditional exercise of state police power such as the wine labeling regulation found in section 25241." App. 59a; *see id.* at 11a-12a, 38a. The court examined the FAAA, its legislative history, and its historical context and found no such preemptive intent on the part of Congress, *see id.* at 38a-43a, 58a-59a, or TTB, *see id.* at 43a-58a. The court thus determined to "proceed under the presumption that no such preemption was intended" and to "bear this presumption in mind when we consider below Bronco's assertion that section 25241, by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law." *Id.* at 59a.

Turning to the substance of petitioners' preemption claim, the California Supreme Court conceded that a federal statute, regulation, license, or permit authorizing certain activity can preempt a state's prohibition of that activity. App. 64a. The court, however, did not consider 27 C.F.R. §4.39(*i*) to constitute such an authorization:

> There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful. In our view it is more accurate to characterize the state statute as prohibiting—with respect to Napa County—what the federal regulation's grandfather clause *does not prohibit*.

App. 64a (internal quotations and citations omitted). As for the COLAs, the court did not consider them "a license or

permit as understood in" this Court's preemption decisions. App. 69a. Accordingly, the California Supreme Court reversed the Court of Appeal's holding that Section 25241 is preempted by federal law and remanded the case for disposition of petitioners' remaining claims. App. 71a.[7]

The Court of Appeal rejected petitioners' remaining claims. App. 129a. With respect to the First Amendment claim, the court held (App. 83a):

> [A] brand name of geographic or viticultural significance conveys information about the geographic source of the grapes used to make the wine. For that reason a brand name is entitled to First Amendment protection as commercial speech only if the information about the source of the wine is accurate. To the extent a brand name of geographic significance is more likely to deceive the public than to inform it because it is suggestive of a false or misleading source of the grapes used in making the wine, it is inherently misleading and its use may be prohibited.

The California Supreme Court denied review. App. 172a.

REASONS FOR GRANTING THE WRIT

1. Under the Supremacy Clause, no state may *prohibit* what federal law affirmatively *authorizes*, whether that authorization takes the form of a statute, a regulation, or a license or permit. The California Supreme Court's decision upholding Section 25241, which outlaws the use of wine labels expressly authorized by a federal regulation and numerous federally-issued COLAs, starkly conflicts with this settled principle. *See* pp. 11-14, *infra*. Moreover, the California Supreme Court's distinction between "(1) not making an activity unlawful, and (2) making that activity

---

[7]While that remand was pending, Bronco filed a petition for certiorari with this Court, seeking review of the California Supreme Court's preemption holding. Respondents opposed the petition on the grounds, *inter alia*, that the decision was not final in light of the remand. The Court denied the petition. *See* 125 S. Ct. 1646 (Mar. 21, 2005).

lawful," App. 64a, is both wrong as applied to this case and deeply troubling. Virtually *every* federal authorization could be recharacterized this way, rendering none preemptive. *See* pp. 14-16, *infra*.

2. The California Supreme Court's reliance on a presumption against preemption conflicts with decisions of this Court and the courts of appeals in two important respects. First, in requiring petitioners to prove that Congress or TTB had a "clear or manifest purpose" to preempt state law, the California Supreme Court ignored this Court's repeated admonition that no such burden of proof exists in conflict preemption cases because "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict" between federal and state law. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 885 (2000); *see* cases cited on pp. 16-20, *infra*. Second, the presumption against preemption is inapplicable where, as here, "the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108-09; *see* pp. 21-22, *infra*. The California court's cramped view that the "*Locke* exception" arises only when relevant federal regulation has been "manifest since the beginning of our Republic" squarely conflicts with numerous federal appellate decisions involving federal statutes and regulation no older than the FAAA. *See id.*

3. The California Court of Appeal created further conflicts with decisions of this Court and the federal and state appellate courts by holding that Bronco's brands are "inherently misleading" and thus without First Amendment protection because the brands, standing alone, are "more likely to deceive the public than inform it." Because the court did not ask whether any potential for deception could be cured by additional information on the labels, its decision conflicts with the decisions of the Court that have recognized disclosure as the preferred alternative for potentially misleading commercial speech. Review would give this Court an opportunity to clarify the line between "potentially

misleading" and "inherently misleading" commercial speech, a line that the lower courts have drawn inconsistently and in conflict with this Court's decisions. *See* pp. 23-27, *infra*. Moreover, in deeming petitioners' brands "inherently misleading," the court below improperly deferred to the Legislature's purported "findings" that petitioners' brands were deceptive. But this Court's cases teach that the question of whether speech is outside the First Amendment is subject to *de novo* review. The state court also improperly disregarded the findings of federal regulators that Bronco's brands are *not* inherently misleading. Review is needed to make clear that courts exercise independent judgment in determining whether speech is inherently misleading, particularly when doing so conflicts with repeated expert judgments made by federal regulators. *See* pp. 27-30, *infra*.

A. THE CALIFORNIA SUPREME COURT'S CONCLUSION THAT SECTION 25241 IS NOT PREEMPTED CONFLICTS WITH DECISIONS OF THIS COURT.

1. Section 25241 Impermissibly Prohibits Conduct Expressly Authorized By 27 C.F.R. §4.39(*i*) And Federal COLAs.

"[S]tate law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Federal regulations have "no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). A preemptive conflict between state law and a federal statute or regulation arises, *inter alia*, when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law—"whether that 'obstacle' goes by the name of 'conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference,' or the like." *Geier*, 529 U.S. at 873 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Under the rubric of obstacle- or conflict-preemption, this Court repeatedly has invalidated state laws that ban conduct specifically authorized by federal laws or regulations. *See, e.g.*, *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (state law prohibiting national bank from selling insurance preempted by federal law allowing such sales); *de la Cuesta*, 458 U.S. at 154-59 (federal regulation permitting federally chartered savings and loans to exercise due-on-sale mortgage clause preempted state prohibition); *McDermott v. Wisconsin*, 228 U.S. 115, 125-26 (1913) (Treasury Department decision that syrup made of corn starch and sugar syrup could be labeled "Corn Syrup with Cane Flavor" preempted state law prohibiting such label).

Likewise, this Court, since *Gibbons v. Ogden*, has struck down state laws impairing the exercise of a license or permit issued under a federal regulatory scheme. *See* 22 U.S. (9 Wheat.) 1, 221 (1824) ("[T]he act of a State inhibiting the use of . . . any vessel having a license under the act of Congress, comes, we think, in direct collision with that [federal] act.") (Marshall, C.J.)); *accord, e.g.*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978) (federal certification of vessel's safety preempted state's more stringent safety requirements); *Sperry v. Florida*, 373 U.S. 379, 384 (1963) (non-lawyer's admission to practice before U.S. Patent & Trademark Office preempted state law barring non-lawyers from such practice); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (*per curiam*) (federal certification of contractor as "responsible" preempted inconsistent state licensing requirements); *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152 (1946) (federal approval of interstate utility project preempted state attempt to forbid project).

All these cases reflect this Court's view "that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank*, 517 U.S. at 33; *accord, e.g.*, *Leslie Miller, Inc.*, 352 U.S. at 190 ("Subjecting a federal

contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility.'"); *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954) ("[I]t would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate.").

The fact that a federal law, regulation, or other authorization is framed in *permissive*, rather than mandatory, terms thus is not determinative. As this Court has explained:

> The two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said, "you must sell insurance," while the state law said, "you may not." Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to "stand as an obstacle to the accomplishment" of one of the Federal Statute's purposes . . . ."

Barnett Bank, 517 U.S. at 31 (quoting *Hines*, 312 U.S. at 67); *cf. de la Cuesta*, 458 U.S. at 155 (a "conflict does not evaporate" simply because the state law at issue "permits, but does not compel" an action contrary to federal law).

Petitioners' use of the brands and labels in question was both generally authorized by federal regulations *and* specifically authorized by individually-issued COLAs. The authorization granted by 27 C.F.R. §4.39(*i*)'s grandfather clause is functionally indistinguishable from the laws and regulations deemed preemptive in *Barnett Bank*, *de la Cuesta*, and *McDermott*. Likewise, the COLAs authorizing use of Bronco's labels in interstate commerce are indistinguishable from the interstate licenses and permits held preemptive in *Gibbons*, *Ray*, *Sperry*, and *Leslie Miller*. By purporting to nullify the regulation and the COLAs, Section 25241 "amount[s] to a suspension or revocation" of a federally-granted "right to operate." *Castle*, 348 U.S. at 64.

The California Supreme Court's decision upholding the statute thus conflicts with settled preemption principles.

2. The California Supreme Court's Attempt To Recast TTB's Authorization Of Petitioners' Brands And Labels As A "Non-Prohibition" Creates An Exception To Preemption That Could Swallow The Rule.

The California Supreme Court attempted to justify its decision with this Court's precedents by distinguishing "between (1) not making an activity unlawful, and (2) making that activity lawful" and by characterizing Section 25241 as merely "prohibiting—with respect to Napa County—what the federal regulation's grandfather clause *does not prohibit*." App. 64a (emphasis in original).

Whatever force the California Supreme Court's distinction between an express authorization and a failure to prohibit may have in other contexts, that distinction has no relevance here. TTB's geographic-brand rule does *not* simply leave certain labeling unaddressed. Rather, the regulation covers *all* geographic brand names, old and new, and specifies in affirmative language the conditions under which *each* category may be used. Thus, Bronco's brands and labels are lawful, not because they escape notice under 27 C.F.R. §4.39(*i*), but because that regulation *expressly* authorizes their use in commerce, as long as the label also bears a suitable appellation or some other statement "sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine." *Id.* §4.39(*i*)(2). Indeed, in providing alternative means of complying with a federal standard, the grandfather clause is quite analogous to the decision of the Secretary of Transportation not to require airbags in all cars, but to permit use of alternative safety devices, which this Court held preempted state tort liability for using such an alternative. *See Geier*, 529 U.S. at 881; *see also, e.g.*, *Crosby*, 530 U.S. at 378 ("The State has set a different course, and its statute

conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.").

Moreover, TTB did not simply authorize the use of grandfathered geographic brands as a class, through a regulation of general application. TTB also issued dozens of COLAs authorizing petitioners to use *each individual label* bearing a brand outlawed by Section 25241 and a non-Napa appellation of origin. The California Supreme Court made no serious attempt to square its decision with this Court's many decisions holding such authorizations preemptive, but instead asserted without analysis that a COLA does not "constitute[] a license or permit as understood in those cases." App. 69a. This unsupported *ipse dixit* cannot save a statute that so plainly conflicts with federal law.

Contrary to the California Supreme Court's suggestion, the fact that the California Legislature's goals were the same as Congress's—preventing deception—does not save Section 25241. *See* App. 64a. As this Court has repeatedly stressed, the "fact of a common end" cannot neutralize a state statute's "conflicting means." *Crosby*, 530 U.S. at 379-80; *accord, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 106-08 (1992) (collecting cases); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation."). In particular, this Court has deemed preemptive federal regulatory determinations of *how much regulation is required* to achieve a congressionally-mandated objective. *See, e.g., Ray*, 435 U.S. at 178 (preemption arises "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) (same). The same logic applies here, inasmuch as TTB actually rejected as "too restrictive" a rule that would have limited use of established

geographic brand names to wines from the region referenced in the brand. *See, e.g.*, *Geier*, 529 U.S. at 881; *supra* at p. 4.

The California Supreme Court's decision not only is wrong, but also is a dangerous precedent. Arguably, *any* federal grant of authority, whether a law or regulation of general applicability or a license or permit specific to the holder, may be recast as merely "not making an activity unlawful." Such easy formalisms would render nugatory a critical portion of this Court's preemption jurisprudence.

B. THE CALIFORNIA SUPREME COURT'S APPLICATION OF A "PRESUMPTION AGAINST PREEMPTION" CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL APPELLATE COURTS.

1. In Conflict-Preemption Cases, There Is No Burden Of Proving "Clear And Manifest" Preemptive Intent On The Part Of Congress Or The Agency.

In holding that a presumption against preemption should apply absent proof of a "clear and manifest purpose" on the part of Congress or the agency to preempt state law, (App. 59a), the California Supreme Court contradicted this Court's repeated admonition that no such proof is necessary or appropriate in conflict-preemption cases:

> While "[p]re-emption fundamentally is a question of congressional intent," this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area—so-called "field pre-emption"—the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. Indeed, one can assume that Congress or

> an agency ordinarily would not intend to permit a significant conflict. (citations omitted).[8]

Geier, 529 U.S. at 884; *accord, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("[W]here state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" (quoting *de la Cuesta*, 458 U.S. at 154 (brackets in quotations in original)).

At least one federal court of appeals, in a case involving analogous facts, has rejected the precise analysis used by the California Supreme Court. In *Wells Fargo Bank v. James*, 321 F.3d 488 (5th Cir. 2003), the Fifth Circuit addressed the preemptive effect of a federal regulation (12 C.F.R. §7.4002(a)) authorizing (but, as here, not requiring) national banks to "charge [their] customers non-interest charges and fees." *Id.* at 490. Federal regulators had construed "customers" to include non-account-holders who presented checks to a national bank for payment. *Id.* A Texas statute, however, prohibited banks from levying charges for cashing a check drawn on the same bank, thus creating a conflict. *Id.* In striking down the state law, the Fifth Circuit rejected the notion that the plaintiffs had to show preemptive intent: "[W]e are concerned with whether Congress intended to delegate . . . the authority to authorize the non-account-holding payee check-cashing fee, not with whether Congress intended that state law would be

---

[8]This Court's willingness to assume a *general* federal intent to preempt conflicting state law, rather than require proof of a preemptive intent specific to the particular statute or regulation, explains the numerous decisions of this Court invalidating state laws on implied conflict-preemption grounds without mentioning any presumption against preemption. *E.g.*, *Barnett Bank*, 517 U.S. at 31; *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 260-68 (1985); *Sperry*, 373 U.S. at 379.

preempted." *Id.* at 492-93 (citing *City of New York*, 486 U.S. at 64); *accord de la Cuesta*, 458 U.S. at 154 (proper question is whether agency "has exceeded [its] statutory authority or acted arbitrarily").

The California high court's decision to impose a presumption against preemption merely because Bronco could not show that Congress or TTB had a "clear or manifest purpose" to preempt Section 25241 stands in clear conflict with this Court's decisions and with *Wells Fargo*.[9] This Court should review the decision below to make clear that no such proof is necessary in conflict-preemption cases.

But this case also presents an opportunity to address a more fundamental question that was posed but not resolved by this Court in *Crosby* and on which the courts are in conflict, namely, whether the presumption against preemption should be *inapplicable* in conflict-preemption cases. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000). The California Supreme Court resolved this question in the negative, stating: "We discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable in the present circumstances, and until the high court directs otherwise, we reject Bronco's view on this point." App. 13a n.12. The Seventh and Fourth Circuits more broadly "presume that, in *all* circumstances, 'Congress does not intend to supplant state law.'" *Frank Bros., Inc. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) (emphasis added); *accord Pinney v. Nokia, Inc.*, 402

---

[9]The California Supreme Court dismissed *Geier* in a footnote as immaterial on the puzzling ground that it "did not even address the presumption-against-preemption doctrine." App. 13a n.12. But that "doctrine" was the subject of explicit debate between the *Geier* majority and dissent, with the majority rejecting the "clear and manifest purpose" burden imposed by the California Supreme Court in this case. Similarly, that court did not mention the Fifth Circuit's decision in *Wells Fargo*, although it was directly on point and discussed in petitioners' briefs.

F.3d 430, 453 (4th Cir. 2005), *cert. denied* --- S. Ct. ---, 74 USLW 3108, 3269, 3274 (Oct. 31, 2005) (No. 05-198).

The Eleventh Circuit, however, has held that "we do *not* apply a presumption against preemption" at least in conflict preemption cases.[10] *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1502 (11th Cir. 1997) (emphasis added) (citing *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989)); *see also Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-27 (11th Cir. 2004) (applying presumption in field preemption, but not in conflict preemption, analysis); *Pharmaceutical Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002) (reaffirming general unavailability of presumption in conflict preemption cases).

Likewise, as many commentators have pointed out, the Supremacy Clause betrays no suggestion of a presumption against preemption:

> First, and most obviously, the constitutional text provides no basis for it. Although the Court has applied presumptions or clear-statement rules in the context of the 10th and 11th Amendments, those rules are supported by constitutional text that clearly preserves state authority. There is no comparable provision to justify a presumption against pre-emption.
>
> To the contrary, the supremacy clause displaces state authority. It makes no more sense to root a presumption against pre-emption there than it would to base a presumption in favor of abrogating state immunity in the 11th Amendment. Indeed, if the supremacy clause supports any presumption, it supports one *in favor of pre-empting state authority.*[11]

---

[10]Although the specific holding in *Lewis* was effectively overruled by *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), *Sprietsma* did not address the applicability *vel non* of a presumption against preemption in conflict cases, thus leaving this aspect of *Lewis* undisturbed.

[11]Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In*,

(continued . . .)

As these commentators argue, the Supremacy Clause is not "about federalism" at all:

> It neither limits federal power nor preserves state authority. To the contrary, it provides a choice-of-law rule in favor of federal law. No one disputes this. The pre-emption cases feature no long discourses on the historical meaning of the supremacy clause or heated disputes over its scope or justiciability. All nine justices agree that when federal and state law conflict, the former displaces the latter. Accordingly, the question that divides the Court in pre-emption cases is essentially one of statutory interpretation: Does the federal statute or regulation at issue really conflict with state law?

Clement & Dinh, *supra* note 11, at 66; *accord* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §6-28, at 1172 (3d ed. 2000) (conflict-preemption cases "may pose complex questions of statutory construction but raise no controversial issues of power" as between federal government and states).

As this Court acknowledged in *Geier*, preemption principles are sufficiently "difficult to apply" without the "further complicat[ion]" of new presumptions and special burdens that would create "practical difficulties for litigants and lower courts." *Geier*, 529 U.S. at 873. The Court thus should take the opportunity presented by this case to resolve a conflict in the lower courts over whether the presumption against preemption ever applies in conflict preemption cases

---

(. . . continued)
LEGAL TIMES, June 19, 2000, at 66; *accord* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1319 (2004); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968, 971, 1013 (2002); Caleb Nelson, *Preemption*, 86 U. VA. L. REV. 225, 235-64, 292-93 (2000); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2094 (2000); The Supreme Court 1999 Term: Leading Cases, *Federal Preemption of State Law*, 114 HARV. L. REV. 339, 345-46 (2000).

and whether, if it does, evidence of preemptive intent on the part of Congress or a federal agency is necessary to avoid or overcome the presumption.[12]

2. The California Supreme Court's Reliance On The History Of Federal Wine-Labeling Regulation To Preclude Application Of The Presumption Against Preemption Conflicts With Decisions Of This Court And The Federal Courts Of Appeals.

Even in contexts in which a presumption against preemption may be applicable, this Court has refused to recognize such a presumption where, as here, "the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108-09. This Court, however, has not yet spelled out how much of a "history" of a "federal presence" is required, and how "significant" that presence must be, to trigger the *Locke* exception. Nor have lower court decisions provided clear answers to these questions. *Compare, e.g.*, *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) (federal regulation of local telephone service commencing in 1996 sufficient to trigger *Locke* exception), *and Wachovia Bank v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (presumption "disappears" in face of longstanding federal regulation of federally chartered banks, despite "dual" system of state and federal regulation), *with, e.g.*, *Pinney, Inc.*, 402 F.3d at 454 n.4 (federal regulation of wireless telecommunications does not trigger

[12]This Court recently invited the Solicitor General to submit a brief expressing the views of the United States in response to a petition for certiorari in a case concerning the applicability of the presumption against preemption in express-preemption cases. *See* Order dated Nov. 14, 2005, *Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission*, No. 05-331, 546 U.S. --- (filed Sept. 12, 2005). Because the instant case concerns the applicability of the presumption against preemption in *conflict*-preemption cases, the Court may wish to call for the views of the Solicitor General here as well.

Locke exception where states retain "considerable authority" in that arena), *and Vaccaro v. Office of Personnel Mgmt.*, 262 F.3d 1280, 1292 (Fed. Cir. 2001) (Dyk, J., dissenting) (presumption should have applied because case involved domestic-relations issues, a traditional province of state law).

Even still, the California Supreme Court appears alone in interpreting *Locke* to require proof of a substantial federal presence dating back to the "beginning of our Republic" to avoid application of the presumption against preemption. App. 37a n.42. To be sure, *Locke* itself involved a federal regulatory field of such early vintage. But *Locke* nowhere states or even implies that *only* such hoary federal involvement will foreclose the presumption, and the federal appellate courts applying *Locke* clearly have read no such arbitrary limitation into it. Indeed, many cases invoking the *Locke* exception have involved federal regulatory schemes that arose contemporaneously with, or even later than, the FAAA. *E.g., Public Util. Dist. No. 1 v. IDACORP, Inc.*, 379 F.3d 641, 648 n.7 (9th Cir. 2004) (Federal Power Act of 1935); *Wisconsin Bell*, 340 F.3d at 441 (federal regulation of local telephone service commencing in 1996); *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (Federal Communications Act of 1934); *UPS v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (Federal Aviation Administration Authorization Act of 1994).

In this case, it is undisputed—even by the California Supreme Court—that as of 2000, when California adopted Section 25241, an extensive federal system of "national rules governing the distribution, production, and importation of alcohol" had been in place for over 75 years. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995). This case thus presents an opportunity to clarify when the "federal presence" is sufficiently long-standing to trigger the *Locke*

exception, and in particular, to make clear that it need not date back to the "beginning of our Republic."[13]

C. THE LOWER COURT'S HOLDING THAT BRONCO'S BRANDS ARE "INHERENTLY MISLEADING" AND THUS UNPROTECTED UNDER THE FIRST AMENDMENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS.

1. This Court Should Grant Review To Clarify When Speech Is "Inherently" As Opposed To "Potentially" Misleading

In addressing the constitutionality of government attempts to regulate allegedly misleading speech, this Court has stressed the "constitutional presumption favoring disclosure over concealment." *Ibanez v. Florida Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 145 (1994); *see also Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) (speech may not be banned if "State can regulate such abuses and minimize mistakes through far less restrictive and more precise means"); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (State may not ban allegedly misleading speech "if the information also may be presented in a way that is not deceptive"). In sum, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not

---

[13]Petitioners do not concede the accuracy of the California Supreme Court's historical account of federal wine labeling regulation *before* the FAAA—especially the court's conclusion that such regulation was a "failure" (App. 35a-36a), and was not even "enforceable" (*id.* at 24a-26a; *see id.* at 22a-28a). For example, authority relied upon by the California Supreme Court establishes that the federal government, from the earliest days of the Republic, *did* regulate the packaging and "marking" of liquor, including wine. Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 540, 552 & n.58 (1940); *see* App. 15a. But even if pre-FAAA federal regulation was less robust than concurrent state regulation (and petitioners dispute this), nothing in *Locke* or its progeny teaches that the presumption applies unless federal regulation of the field in question equaled or exceeded state regulation in quantity or quality.

a first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)

In line with the "constitutional presumption favoring disclosure over concealment," this Court has long distinguished between "inherently misleading" speech and "potentially misleading" speech. *See, e.g., R.M.J.*, 455 U.S. at 203; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 638 (1985); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990); *Ibanez*, 512 U.S. at 145. If "advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive," the speech is unprotected and may be banned outright. *R.M.J.*, 455 U.S. at 202. If, however, "the information also may be presented in a way that is not deceptive," the speech is only "potentially misleading," and the permissible cure is more "disclosure, not concealment." *Ibanez*, 512 U.S. at 145.

The court below acknowledged the distinction between inherently and potentially misleading speech, but then effectively obliterated that distinction by holding that a brand name is "inherently misleading and its use may be prohibited" if it "is more likely to deceive the public than to inform it." App. 83a. The court based this test for identifying inherently misleading speech—and its focus on the brand names standing alone—on this Court's statement in *Central Hudson*: "'[t]he government may ban forms of communication *more likely to deceive* the public than to inform it.'" App. 81a (quoting *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980)).

Central Hudson, however, was decided several years before this Court first articulated the distinction between inherently misleading and potentially misleading commercial speech. Those later decisions establish that a court must consider, not whether the speech at issue, standing alone, is "more likely to deceive the public than to inform it," but rather whether "the information may also be presented in a

way that is not deceptive." *Ibanez*, 512 U.S. at 145. Thus, Bronco's First Amendment challenge to Section 25241 does not turn on whether its *brands* are "more likely to deceive" than not, but whether potential misimpressions created by the brands are, or could be, cured by other information on the *labels*.[14] In short, the Court of Appeal got the wrong answer because it asked the wrong question.[15]

The court below is not alone in relying on an improper "more likely to deceive the public than to inform it" standard for inherently misleading speech. Other state courts have invoked the same standard. *See In re Keller*, 792 N.E.2d 865, 869 (Ind. 2003); *Desnick v. Dep't of Prof. Regulation*, 665 N.E.2d 1346, 1354 (Ill. 1996); *Barry v. Arrow Pontiac, Inc.*, 494 A.2d 804, 813 (N.J. 1985); *cf. Adams Ford Belton, Inc. v. Mo. Motor Vehicle Comm'n*, 946 S.W.2d 199, 203 (Mo. 1997) (finding term "likely to deceive" and therefore "inherently misleading"). The Fourth Circuit in *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988), adopted a similarly broad test, finding use of the term "public accountant" by a non-CPA to be "inherently misleading" because it believed that "*some* members of the public would believe the title . . . has the state's imprimatur."

---

[14]Bronco does not concede that its brands are inherently misleading even if considered in isolation. After long use of such brands, "the geographic term takes on a new meaning denoting the trademark owner as source." 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §14.9 (2004); *accord Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 766 n.4, 768 (1992). The record below amply demonstrates that Bronco's brands have come to identify the owner as the source of the wines. *See, e.g.*, PA 187, 241, 247, 274-75, 354-55, 410-11.

[15]The lower court also erred in relying on *Friedman v. Rogers*, 440 U.S. 1 (1979); *see* App. 82a. *Friedman* was decided when commercial speech jurisprudence was "as yet uncharted." *Id.* at 10 n.9. Indeed, it predated both *Central Hudson* and the Court's later decisions distinguishing between inherently and potentially misleading speech. Thus, the *Friedman* Court's suggestion that no "First Amendment rule" requires the use of disclaimers "whenever the publication of additional information can clarify or offset the effects of the spurious communication," 440 U.S. at 12 & n.11, conflicts with these later cases.

Id. at 605 (emphasis added). Indeed, the Fourth Circuit specifically rejected the plaintiff's argument that the words could not be banned "if the less restrictive alternative of additional explanatory language is available." *Id.*

In contrast, the Tenth Circuit and New York, following this Court's guidance, have limited the "inherently misleading" category to speech that is "*incapable* of being presented in a [non-misleading] way." *Revo v. Disciplinary Bd.*, 106 F.3d 929, 933 (10th Cir.) (citing *R.M.J.*, 455 U.S. at 203) (emphasis added), *cert. denied*, 521 U.S. 1121 (1997); *accord Pearson v. Shalala*, 164 F.3d 650, 655-59 (D.C. Cir. 1999) (rejecting as "almost frivolous" argument that claims on health supplements are inherently misleading absent "significant scientific agreement" where concern could be accommodated by adding disclaimers); *In re von Wiegen*, 63 N.Y.2d 163, 173 (1983) ("If a certain type of information can be presented in a way that is not deceptive, a State may not absolutely prohibit the method used because it is sometimes used to disseminate misleading information.").

The Ninth Circuit employs a "four-factor test" for inherently misleading speech. *See Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994) (internal citations omitted). That test inquires as to "(i) whether the speech restricted is devoid of 'intrinsic meaning,' . . .; (ii) the 'possibilities for deception,' . . .; (iii) whether 'experience has proved that in fact such advertising is subject to abuse,' . . .; [and] (iv) the 'ability of the intended audience to evaluate the claims made.'" *Id.* at 731 (citations omitted).

The test used by the Tenth Circuit and New York is the only standard consistent with the "constitutional presumption favoring disclosure over concealment," *Ibanez*, 512 U.S. at 145, and the notion that "regulating speech must be a last—not a first—resort," *W. States Med. Ctr.*, 535 U.S. at 373; *accord, e.g.*, *Peel*, 496 U.S. at 111 (noting the "constitutional presumption favoring disclosure over concealment"); *R.M.J.*, 455 U.S. at 203. Applying this test would have resulted in a different result below, for there was no evidence before the

Legislature or the courts establishing that Bronco's brands are *incapable* of being presented in a non-misleading way.[16] Even if the requirements imposed by 27 C.F.R. §4.39(*i*)(2) were deemed insufficient, other potential disclosures could be mandated that presumably would cure any potential deception, including, for example, a disclosure stating "GRAPES NOT GROWN IN NAPA COUNTY." *Cf. W. States Med. Ctr.*, 535 U.S. at 373 (striking down provisions of Food and Drug Administration Modernization Act prohibiting advertising and promotion of particular compounded drugs where legislative history showed that government considered available less-restrictive alternatives).

This conflict over the definition of "inherently misleading" commercial speech is no small matter. Such speech has no protection under the First Amendment, and thus may be completely suppressed, without any showing that *Central Hudson* standards have been met. Hence, the conflict cries out for this Court's attention.

2. The Court Should Grant Review To Reverse The State Court's Failure To Give Any Weight To The Repeated Federal Agency Determinations That Petitioners' Labels Are Not Misleading.

In determining that the labels proscribed by Section 25241 are "inherently misleading," the Court of Appeal not only relied on an improper standard, but also wrongly deferred heavily to the California Legislature's "finding" that

---

[16]The evidence before the Legislature consisted of a telephone survey using undisclosed methodology to test consumers' responses to fictional brand names read to them in isolation (no actual labels were provided), along with letters solicited by the NVVA from winery owners and others in the trade alleging that Bronco's brands were deceptive, but not identifying any instance of actual deception or consumer confusion. App. 86a-88a & nn.10-17. In contrast, petitioners' experts testified that, in their collective 100 years of experience in the retail wine industry, they had never encountered a single instance of consumer confusion involving Bronco's brands. PA 345, 373, 377, 381.

the use of any "Napa brand" with any non-Napa appellation is inherently misleading, reviewing that finding only to see if the Legislature's conclusions were reasonable in light of the evidence presented to that body. App. 84a-86a. This approach directly conflicts with this Court's holdings that courts may not defer to the judgment of state legislative bodies in determining whether commercial speech is "inherently misleading." *Peel*, 496 U.S. at 108 ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which members of this Court should exercise *de novo* review."); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996).

Moreover, while deferring uncritically to the findings made by the California Legislature, the court below effectively disregarded the contrary findings made by TTB, in 27 C.F.R. §4.39(*i*) and the numerous COLAs issued to petitioners, that neither grandfathered brand names in general nor petitioners' labels in particular are inherently misleading. In the Court of Appeal's view, the grandfather clause was a "compromise" that was "based upon policy considerations rather than findings of fact," and the COLAs issued to petitioners likewise did not "constitute a finding of fact that overrides a contrary finding by the California Legislature." App. 90a, 92a-93a.

This rationale is manifestly spurious. Although TTB did not make explicit "findings of fact" in the manner of a trial court, its statements in the *Federal Register* notice adopting 27 C.F.R. §4.39(*i*) include the specific finding that the rule—*including* the grandfather clause—would "provid[e] consumers with protection from any misleading impressions that might arise from the use of geographic brand names." 51 FED. REG. at 20,482. That finding is further embodied in the rule itself, which provides that grandfathered brands may be used as long as the label also bears a suitable appellation or "some other statement which the appropriate ATF officer finds to be sufficient to dispel

the impression that the geographic area suggested by the brand name is indicative of the origin of the wine." 27 C.F.R. §4.39(*i*)(2). Unless TTB found that grandfathered brands are only *potentially* misleading, it could not have concluded that an appellation of origin or "some other statement" could be "sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine."

Likewise, as TTB has stressed, its role in reviewing labels is "on a case-by-case basis to *determine* whether any particular label is likely to mislead consumers, including as to the origin of the product" or otherwise fails to conform to federal regulations. 66 FED. REG. at 29,478 (emphasis added). That review process inherently is fact-based, and a COLA necessarily represents a finding that a particular brand name, as viewed in the context of an entire label, is *not* inherently misleading. Any other conclusion entails the assumption that TTB routinely disregards its statutory duty to act so as to "prohibit deception of the consumer," 27 U.S.C. §205(e), an assumption at odds with the traditional deference accorded an agency's implementation of the statutory scheme it is charged to administer. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (citing cases).

Judicial deference is owed to a regulation, like 27 C.F.R. §4.39(*i*), that is adopted by an expert agency after formal notice-and-comment rule-making. *See Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85, 392 (1965) ("[A]s an administrative agency which deals continually with cases in the area, the [FTC] is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act."). Judicial deference also is required when a federal agency interprets a statute through case-by-case decisionmaking, as TTB does in reviewing labels for approval. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). While TTB's determinations that petitioners' labels

are not misleading, as expressed in 27 C.F.R. §4.39(*i*) and the COLAs issued to petitioners, perhaps do not automatically "override" the Legislature's contrary determination, they surely are entitled to "substantial deference" by a court deciding *de novo* whether the latter determination is correct. The Court of Appeal's failure to accord these federal determinations *any* weight conflicts with settled law, and therefore warrants review by this Court.

CONCLUSION

The petition should be granted.

DATED: November 22, 2005.

Respectfully submitted,

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
A Professional Corporation

PETER M. BRODY
(Counsel of Record)
THOMAS W. BEIMERS
ROPES & GRAY LLP

KENNETH S. GELLER
MAYER, BROWN, ROWE & MAW LLP

Attorneys for Petitioners

No. ________

IN THE

Supreme Court of the United States

OCTOBER TERM 2005

BRONCO WINE COMPANY and BARREL TEN QUARTER CIRCLE, INC.,

Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY VINTNERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITIONERS' APPENDIX

JEROME B. FALK, JR.
STEVEN L. MAYER
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600

PETER M. BRODY (Counsel of Record)
THOMAS W. BEIMERS
ROPES & GRAY LLP
700 12th Street, NW, Suite 900
Washington, D.C. 20005
Telephone: 202/508-4600

KENNETH S. GELLER
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, NW
Washington, D.C. 20006
Telephone: 202/263-3225

Attorneys for Petitioners

APPENDIX A

33 Cal. 4th 943

SUPREME COURT OF CALIFORNIA

BRONCO WINE COMPANY et al., Petitioners, v. JERRY R. JOLLY, as Director, etc., et al., Respondents; NAPA VALLEY VINTNERS ASSOCIATION, Intervener.

S113136

August 5, 2004, Filed

NOTICE: As modified Oct. 13, 2004

OPINION:

GEORGE, C. J.--This case concerns three brand-name labels (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) appearing on wine bottled and marketed by petitioners Bronco Wine Company and Barrel Ten Quarter Circle, Inc. (hereafter Bronco). These wines are made not from grapes grown in Napa County, or in the Rutherford viticultural (wine grape growing) region of Napa County,[1] but instead from grapes grown in areas far from Napa, such as Stanislaus County and the environs of the City of Lodi--areas where the cost of grapes, and often their perceived quality as well, is considerably lower. The challenged bottle labels have been approved by the federal agency charged by Congress with enforcing federal labeling law but violate a four-year-old

---

[1] Rutherford is a federally recognized viticultural region located within Napa County. (27 C.F.R. § 9.133 (2003); all further citations to the Code of Federal Regulations are to the 2003 edition unless otherwise indicated.)

California wine labeling statute, which requires that, when the word "Napa" (or any federally recognized viticultural region within Napa County) appears on a brand label, at least 75 percent of the grapes used to make that wine must be from Napa County. (Bus. & Prof. Code, § 25241 (hereafter section 25241).) We granted review to consider the Court of Appeal's conclusion that federal law preempts the state law. We conclude that the state labeling statute is not preempted by federal law and hence that the judgment rendered by the Court of Appeal must be reversed.

I.

Bronco asserts that it specializes in "premium wines at affordable prices." Some of Bronco's wine is bottled at its facilities in Ceres (near Modesto, in Stanislaus County) and in Sonoma County; other Bronco wines are bottled by petitioner Barrel Ten Quarter Circle, Inc., at a recently completed facility in the City of Napa, in Napa County. The latter plant is capable of producing approximately 18 million 12-bottle cases per year--output that would be more than double the current annual production of Napa-grown wines.

Bronco sells wines under approximately 30 labels or brand names. A representative label for the three challenged brand names (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) is set forth in the appendix.[2] As can be seen, with regard to the representative Napa Ridge label, the label lists (in smaller lettering and below the brand name) the "designation" of the wine (the varietal name White Merlot), followed underneath by the "appellation of origin"--the geographic source of the grapes (Lodi). The representative Napa Creek Winery label lists (in smaller lettering and below the brand name) the appellation of origin (Lodi), followed

---

[2] The labels set forth in Bronco's appendix to the petition for writ of mandate are divided into sections for each of the three brand names. The labels selected for description below and displayed in the appendix to our opinion are the first from each section.

underneath by the varietal name (Chardonnay). The representative Rutherford Vintners label lists (in smaller lettering and below the brand name) the appellation of origin (Stanislaus County), followed underneath by the varietal name (Merlot). The "back label" of each states that the wine was "vinted and bottled" by the named winery in "Napa, CA" or in "Napa, California."[3] In addition, many of the Napa Ridge wines include the word "Napa" on bottleneck collars, and some include that word on branded corks.

Bronco acquired these three brand names, and the right to use these labels, from predecessor owners of wineries located in Napa County. The Napa Ridge brand, which Bronco acquired in January 2000 from Beringer Wine Estates for more than $ 40 million, had been in use since the early 1980s. The Napa Creek Winery brand, introduced in 1981, was acquired by Bronco in 1993. The Rutherford Vintners brand originated in the early 1970s, and was acquired by Bronco in 1994.

The prior owner of the Napa Ridge brand had used that name and label for wines made from grapes grown in California's Central Coast, North Coast, and Lodi appellation areas, as well as from Napa County. All of the wines previously marketed by the prior owner under the Napa Creek Winery brand and most wines previously marketed by the prior owner under the Rutherford Vintners brand had been

[3] The word "vinted" is used when wine is fermented at one address and thereafter subjected to "cellar treatment" (such as filtering) at a different address stated on the label. (See 27 C.F.R. § 4.35a(a)(3) & (v).) Each back label also contains a further statement concerning the appellation of origin. The Napa Ridge back label states: "This White Merlot, from the Lodi Region of Northern California, starts with an enticing aroma of strawberry and cherry. . . ." The Napa Creek Winery back label states: "From vineyards blessed by the warm days and cool nights of California's famed Lodi viticultural area, our Chardonnay is well structured with complex flavors from partial barrel fermentation. . . ." The Rutherford Vintners back label reads: "These grapes were harvested from the lush vineyards of Stanislaus County. . . ."

made from Napa County grapes. Under Bronco's ownership, all three of these brands have been used almost exclusively to sell wines made from grapes grown outside Napa County.

The bill that became section 25241 was introduced in the California Legislature in February 2000 (Assem. Bill No. 683 (1999-2000 Reg. Sess.)). After receiving substantial public comment and holding hearings,[4] the Legislature found: "(a)(1) . . . [F]or more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively 'Napa appellations') as denoting that the wine was created with the distinctive grapes grown in Napa County. (2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices. (3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin." (§ 25241, subd. (a), added by Stats. 2000, ch. 831, § 1.)[5]

---

[4] The Legislature heard evidence of intent, or at least willingness, to expand dramatically the marketing of Napa-named brands, including the hope of fully utilizing the capacity of the new 18-million-case bottling plant in the City of Napa, to produce wine from grapes grown outside Napa County. (See transcript of Sen. Governmental Organization Com. hearings on Assem. Bill No. 683 (June 27, 2000), at pp. 29 & 31 [responses to questions by Sen. Chesbro].)

[5] Bronco contests the Legislature's findings, asserting that labels such as those set out in the record are not in law or in fact deceptive because they display a correct appellation of origin. The Legislature's findings to the contrary, however, are supported both by testimony and survey results

The resulting legislation, section 25241, provides in relevant part that no wine produced or marketed in California shall use a brand name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made were grown in Napa County. (*Id.*, subd. (b).)[6]

---

presented at the hearings disclosing consumer confusion relating to such labels. Moreover, as observed at the hearings, an uninformed consumer may not know that an unelaborated term (for example, Lodi) appearing on a label refers to a geographic location outside Napa County or even that the named location (in contrast to the brand name of the wine) signifies the place where the grapes used to make the wine actually were grown. Similarly, consumers in restaurants who order wine by the bottle or the glass from menus may be aware only of the brand name of the wine and generally will not have an opportunity to read the label of the bottle before placing an order.

[6] Section 25241 sets out in subdivision (a) the findings quoted above, and then provides:

> "(b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a [now section 4.25--see 68 Federal Register 39454, 39455 (July 2, 2003)] of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240.
>
> "Notwithstanding the above, this subdivision shall not grant any labeling, packaging, or advertising rights that are prohibited under federal law or regulations.
>
> "(c) The following are names of viticultural significance for purposes of this section:
>
> "(1) Napa.
>
> "(2) Any viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of

The legislative history discloses that section 25241 was designed to close what some legislators termed a "loophole" created by an exception in a federal wine labeling regulation. As discussed more fully below, federal law (the Federal Alcohol Administration Act, or FAA Act, 27 U.S.C. § 201 *et seq.*), enacted by Congress in 1935, bars misleading statements on wine labels (*id.*, § 205(e)) and requires federal approval of each label (via a certificate of label approval [hereafter sometimes COLA]) before that label may be used in interstate or foreign commerce. A 1986 federal regulation, also described more fully below, designed to implement 27

---

the Code of Federal Regulations that is located entirely within Napa County.

"(3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.

"(d) The appellation of origin required by this section shall meet the legibility and size-of-type requirements set forth in either Section 4.38 or Section 4.63 of Title 27 of the Code of Federal Regulations, whichever is applicable.

"(e) Notwithstanding subdivision (b), any name of viticultural significance may appear either as part of the address required by Sections 4.35 and 4.62 of Title 27 of the Code of Federal Regulations, if it is also the post office address of the bottling or producing winery or of the permittee responsible for the advertising, or as part of any factual, nonmisleading statement as to the history or location of the winery.

"(f) The department may suspend or revoke the license of any person who produces or bottles wine who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter, if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.

"(g) This section applies only to wine which is produced, bottled, or labeled after January 1, 2001."

United States Code section 205(e), generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine were in fact grown in that area (27 C.F.R. § 4.39(i)(1)). But a "grandfather clause" appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, *and* the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle. (*Id.*, § 4.39(i)(2)(ii).)[7] In other words, the state statute prohibits, with respect to

---

[7] 27 Code of Federal Regulations section 4.39(i) provides:

> "(i) *Geographic brand names.* (1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.
>
> "(2) For brand names used in existing certificates of label approval issued prior to July 7, 1986:
>
> "(i) The wine shall meet the appellation of origin requirements for the geographic area named; or
>
> "(ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either:
>
> "(A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or;
>
> "(B) A state, county or a viticultural area, if the brand name bears a state name; or
>
> "(iii) The wine shall be labeled with some other statement which the appropriate ATF [Bureau of Alcohol, Tobacco and Firearms] officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.
>
> "(3) A name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of this chapter, or by a foreign government, or when found to have viticultural significance by the appropriate ATF officer."

Napa County, what the federal regulation's grandfather clause does not prohibit.[8]

In late December 2000, shortly before section 25241 was to become effective, Bronco filed an original petition for a writ of mandamus in the Court of Appeal,[9] seeking to prohibit respondents (the Department of Alcoholic Beverage Control and its then Interim Director, Manuel R. Espinoza, currently Jerry R. Jolly, Director) (hereafter the Department) from enforcing section 25241 with respect to Bronco's wines, on the ground that the state statute to the extent it applies to wine destined for interstate or foreign commerce is preempted by the grandfather clause contained in the federal law. Bronco also claimed that the California statute violates the First Amendment, the commerce clause, and the takings clause of

---

[8] Bronco asserts that the statute was drafted in such a manner as to protect other established Napa County wineries, and to target "only a single brand owner--Bronco" (and its three grandfathered brands). The record discloses, however, at least 32 other Napa-related "grandfathered" brands (none of which, it appears, *presently* produces any wine that would violate section 25241) that also would be covered by the statute, including the "Napa named" brands Napa Wine Cellars, Napa Wine Co., Napa Cellars, Napa Valley Winery, Napa Vintners, and "Napa viticultural appellation" brands Rutherford Hill, Stag's Leap Wine Cellars, Stags' Leap Winery, Spring Mountain, Mount Veeder Winery, St. Helena Vineyards, and Oakville Vineyards.

Bronco also complains that the statute is underinclusive, in that it does not restrict the use of non-Napa brand names, such as "Monterey Vineyards" or "Sonoma Creek," nor does it preclude the use of brand labels denoting a viticultural area within Napa, such as the brand "Stag's Leap Wine Cellars," for a Napa County wine made with grapes grown outside the Stags Leap District of the Napa Valley. (Cf. Bus. & Prof. Code, § 25240 [requiring such labels to state a "Napa Valley" appellation in addition to the viticultural area within Napa Valley].) Any such underinclusiveness, however, is irrelevant to our present preemption inquiry.

[9] Business and Professions Code section 23090.5 divests the superior court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing Business and Professions Code section 25241.

the United States Constitution. Intervener Napa Valley Vintners Association (the NVVA) joined with the Department in defending the validity of the state enactment. The Court of Appeal issued an alternative writ and granted a stay of enforcement of section 25241. As noted above, that court ultimately concluded that section 25241 is preempted by federal law, and to date that statute has not been enforced. We granted review to address the preemption issue only.

II.

A.

The basic rules of preemption are not in dispute: Under the supremacy clause of the United States Constitution (art. VI, cl. 2), Congress has the power to preempt state law concerning matters that lie within the authority of Congress. (*Crosby v. National Foreign Trade Council (2000) 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352,(Crosby).*) In determining whether federal law preempts state law, a court's task is to discern congressional intent. (*English v. General Elec. Co. (1990) 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65.)* Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. (*Jones v. Rath Packing Co. (1977) 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (Jones).*) Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law (*Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447(Rice))*; (ii) when compliance with both federal and state regulations is an impossibility (*Florida Avocado Growers v. Paul (1963) 373 U.S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (Florida Avocado))*; or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz (1941) 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581(Hines)*; see also *Crosby, supra, 530 U.S. at p. 373*; *Barnett Bank of*

Marion Cty., N.A. v. Nelson (1996) 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237(Barnett Bank); *Lawrence County v. Lead-Deadwood School Dist. (1985) 469 U.S. 256, 260 105 S. Ct. 695,83 L. Ed. 2d 635 (Lawrence County)*; *Capital Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 699, 104 S. Ct. 2694, 81 L. Ed. 2d 580*; see also *Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 923-924, 12 Cal. Rptr. 3d 262, 88 P.3d 1 (Dowhal).*)

In the present case, it is clear that Congress has not expressly preempted state authority with respect to the regulation of wine generally, or with respect to wine labels in particular, and Bronco does not contend otherwise. Neither does Bronco contend that this is a case in which Congress has occupied the field and thus impliedly preempted the state statute here at issue. Nor does Bronco contend that implied preemption is shown because compliance with both federal and state regulations is impossible; as Bronco concedes, it can comply with the stricter state law and simultaneously comply with federal law. Instead, Bronco asserts that we should find implied preemption in this case because *section 25241* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[10] (Cf. *Dowhal, supra, 32 Cal.4th 910, 929, 935* [state law warnings concerning nicotine frustrate the purposes of the federal *Food, Drug & Cosmetic Act* and corresponding federal regulations].)

As we shall explain, we disagree that *section 25241* is impliedly preempted by federal law. In reaching this conclusion we first address Bronco's assertion that a presumption against preemption does not apply in this matter. (See *post*, pt. II.B.1.) After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress's adoption of the *FAA Act in 1935*--a history that reveals substantial state involvement and very little federal

---

[10] Bronco suggests, however, that the state properly may "enact an 'in-state' version of *section 25241*"--a regulation that would, presumably, apply only with respect to wine that is not sold in interstate commerce.

regulation--we conclude that a presumption against preemption does indeed apply in this case. Next, we address the intent of Congress in enacting the FAA Act in 1935. (See *post*, pt. II.C.1.) The legislative history of that enactment reveals congressional intent, among other things, (i) to prevent the deception or misleading of consumers related to the labeling of wine and other alcoholic beverages, and (ii) to supplement--but not supplant--existing state regulation of the industry. We next consider the intent of the responsible federal regulatory agency vis-a-vis state regulation of wine brand labeling, as reflected in regulations and comments set out in the Federal Register. (See *post*, pt. II.C.2.) As we explain, the record reveals that the federal regulatory agency has long operated on the understanding that states may and would continue to impose their own stricter wine labeling regulations. Finally, we address the substantive issue of implied preemption of the particular state legislation at issue, and conclude that the California statute in question does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See *post*, pt. II.D.)

B.

The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. (See, e.g., *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 422 [106 Cal. Rptr. 2d 271, 21 P.3d 1189]*, and cases cited.) An important corollary of this rule, often noted and applied by the United States Supreme Court, is that "[*w*]*hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'*" (*California v. ARC America Corp. (1989) 490 U.S. 93, 101 [104 L. Ed. 2d 86, 109 S. Ct. 1661]*, italics added (*ARC America Corp.*), quoting *Rice, supra, 331 U.S. 218, 230*; see also, e.g., *United States v. Locke (2000) 529 U.S. 89,*